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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1945

No. 625

CECIL I. HUST, Petitioner and Plaintiff-Respondent below,

vs.

MOORE-McCORMACK LINES, INC., Respondent and Defendant-Appellant below.

PETITION FOR WRIT OF CERTIORARI and BRIEF IN SUPPORT OF PETITION

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ERRATA

Page 7, ll. 10ff	Change to read "as well as the assignments of error (R. 12) and in respondent's requested instruction III and IV, which were by mistake omitted," etc.
Page 28, l. 22	Change to read "the purpose of performing its *duties* under the."
Page 31, ll. 13, 14	Change to read "other provisions listed above *to the* effect that the Agent *shall* be the operator in fact of the ship."
Page 40, l. 25	Change to read "fact as well as *law*."
Page 44, l. 27	Change to read "own act.' (R. 22.) We submit; however *that* it is."
Page 61, l. 6	Change to read "other evidence *on* record," etc.

IN THE

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OCTOBER TERM, A.D. 1945

No. _____

CECIL I. HUST, Petitioner and
Plaintiff-Respondent below,

vs.

MOORE-McCORMACK LINES, INC.,
Respondent and
Defendant-Appellant below.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Cecil I. Hust, respectfully petitions this Honorable Court for a writ of certiorari to the Supreme Court of the State of Oregon.

STATEMENT OF THE MATTER INVOLVED

This case involves an action by a seaman under the Jones Act (46 U.S.C. 688; 38 Stat. 1185; 41 Stat.

1007) against a steamship company for injuries received due to the negligent operation of a ship operated under a standard General Agency Agreement between the War Shipping Administration and respondent. (Ex. 21; R. 116, 149.)

In October, 1942, petitioner shipped out on the Liberty ship "S.S. MARK HANNA" after signing the shipping articles as required by law for many years. (R. 93, 95; Ex. 13, R. 93, 142-3; 46 U.S.C. sec. 713; 30 Stat. 762, 764; 38 Stat. 1168.) It is undenied that it was also customary for such steamship companies to request the Unions to furnish crew members (R. 100); that there were in effect contracts between the company and various unions (R. 94-5, 101-2); that despite the General Agency Agreement and a so-called "statement of policy" these contracts continued in effect (Ex. 21, R. 116, 149; Ex. 25, R. 130, 164; R. 101-2) and that the company and unions continued to negotiate for the settlement of disputes (R. 103). Petitioner testified that he always understood that he was an employee of the company and had never been informed to the contrary. (R. 110.)

On March 9, 1943, petitioner was ordered to go to the ship's locker in the forepeak for a mooring line (R. 56, 88). He had only once before been in that portion of a similar ship (R. 56, 59, 65, 66). There was no light in the locker room (R. 57, 60, 69, 79, 91), although it was usual to have a light there and although the light globe was replaced immediately after the accident (R. 60, 67, 74, 67, 90). He then fell in the dark through an unguarded hatchway (R. 59, 60, 70), although it was customarily protected by a guard chain which had been removed the day or so before and was replaced by a

guard rope immeditely after the accident. (R. 70, 74, 79, 83-4, 89, 90.)

In defense, respondent company, although admitting that it was the operator of the ship (Answer Par. I, R. 6 and see R. 116), contended that the extent of its operations were limited by the General Agency Agreement (Ex. 21; R. 116, 149) and that under the terms of that agreement it was not the employer of the crew and thus not liable under the Jones Act. (See Answer, R. 6.) Respondent did not attempt to show in what ways, if any, the actual practice of employing crews and operating ships had changed since before the war, when it would clearly have been liable in such a case, but relied principally upon the terms of the General Agency Agreement.

On the question of employer-employee relationship the jury found by special interrogatory that petitioner was an employee of the Company and by its verdict in favor of the petitioner found also that the company was responsible for the negligent operation of the ship. (R. 8, 9). Judgment was entered accordingly. (R. 9.) On appeal by the respondent herein the Supreme Court of the State of Oregon reversed this verdict and judgment, holding that in view of the terms of the General Agency Agreement, Public Law 17 (50 U.S.C. App., sec. 1291; 57 Stat. 45) and the evidence on record the company was, for the purposes of the Jones Act, neither the employer of the crew nor responsible for the negligent operation of the ship. (R. 18, 25, 28, 39.) Judgment was entered by the Supreme Court of the State of Oregon, based on the above-mentioned openion, on April 24, 1945. (R. 38.) On June 29, 1945, the Oregon Supreme Court entered an order denying a petition for rehearing of

its decision in this case. (R. 39.) On September 17, 1945, an order was entered herein by Associate Justice Rutledge extending the time in which to file the within petition for writ of certiorari from September 29, 1945, to October 29, 1945. (R. 174.) On October 23, 1945, a further extension was granted by Associate Justice Douglas to November 28, 1945. (R. 175.)

STATEMENT ON JURISDICTION

1. Statement of Federal Rights Relied Upon.

The grounds upon which it is claimed that a federal question is involved in this case are that your petitioner has from the institution of this case sought to specially claim and enforce a right or privilege under a statute of the United States, within the meaning of Section 237 (b) of the Judicial Code, as amended (28 U.S.C. 344 (b)), and, in addition, that respondent has from the institution of this case sought to specially set up and claim a right, privilege or immunity under a statute of and also under a commission held and/or authority exercised under the United States, within the meaning of said Section 237 (b).

As already stated, this case is an action by a seaman relying upon the rights and privileges provided under the Jones Act (46 U.S.C. 688, 38 Stat. 1185; 41 Stat. 1007) which provides that:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; . . ."

As also stated above, it has been the defense of respondent herein throughout this case that it has a right, privilege or immunity from suit by virtue of the terms of this same statute and also by virtue of its authority and/or commission as a general agent of the War Shipping Administration under the provisions of its General Agency Agreement.

Additional grounds of jurisdiction result from the fact that both petitioner and respondent sought during the course of the proceedings in the courts of the State of Oregon to confirm the existence of the rights, privileges and immunities respectively claimed by them by reference to the provisions of Public Law 17 (50 U.S.C. App. Sec. 1291, 57 Stat. 45) enacted March 24, 1943, only a few days after the injury to petitioner in this case, and the Supreme Court of Oregon in its decision endeavored to interpret and construe the provisions of that federal statute. The principal provision of Public Law 17 in controversy is as follows:

> Section 1 (a) "Officers and members of the crews . . . employed on United States . . . vessels as employees of the United States through the War Shipping Administration shall, with respect to . . . (2) . . . injuries . . . or claims arising therefrom . . . have all of the rights . . . under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels."

2. Federal Question Properly Raised.

The complaint filed by petitioner in the Circuit Court of the State of Oregon for Multnomah County states specifically that this action is brought under the Jones Act. (Complaint, par. VII; R. 5.) This fact was con-

ceded by respondent. (Answer, par. VII; R. 7.) The Oregon Supreme Court also specifically recognized this fact in its decision. (R. 14.)

With reference to Public Law 17, supra, neither the pleadings nor the assignments of error make specific reference to claims of rights or immunity under this statute for the reason that it was not enacted until shortly after the cause of action arose in this case and was thus referred to by the parties solely to confirm the existence of the rights and immunity respectively claimed by them. It was recognized by the Oregon Supreme Court in its decision, however, that petitioner claimed that the provisions of this statute confirmed his right to sue a general agent of the W.S.A. under the Jones Act despite provisions of the General Agency Agreement. (R. 27-33.) Moreover, the Oregon Supreme Court not only undertook to construe and interpret the effect of this federal statute upon the rights claimed by this petitioner under the Jones Act, but undertook to pass specifically upon the question whether the purpose of Public Law 17 "was to grant to agent *immunity* from suit for their own torts." (R. 32.) It is true that the Oregon Court held only that this statute did nothing to change the liability of general agents under the Jones Act (R. 33), but this determination necessarily involved a consideration of whether this statute created, destroyed or confirmed the existence of the rights, privileges or immunities respectively claimed by the petitioner and respondent in this case as well as the question whether the statute was sufficiently unambiguous to satisfy the rule established by this Court in *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 581, to the effect that long established rights of seamen

can only be destroyed by a clear expression of Congressional intent.

The claims by respondent to right, privilege or immunity by virtue of the terms of its General Agency Agreement with the War Shipping Administration, were also not specifically referred to either in the pleadings or in the assignments of error on appeal. We submit, however, that such claims to right, privilege or immunity were implicit in respondent's answer denying that it was the employer of petitioner, as well as in requested instructions and assignments of error to this III and IV, which were by mistake omitted in printing the record, although included in petitioner's praecipe, noting use of terms and language similar to those in Section 3 A (d) of the Agreement; Tr. 268; cf R. 151.) Conclusive proof of reliance upon the terms of the Agency Agreement is shown by the fact that a copy of the agreement was introduced in evidence by respondent. (Ex. 21, R. 116, 149.) The Oregon Supreme Court also makes it clear that the respondent relied specially upon and set up and claimed a right or immunity allegedly granted under the terms of the agreement designating it as a general agent for the War Shipping Administration. (See R. 14.) The court then proceeds to interpret the terms of this agreement and reaches the conclusion that they express an intent by the United States that it shall be the employer of the crew and operator of the ship (R. 18), thereby granting an immunity to the respondent from liability as employer and operator.

The only possible question, from the standpoint of the jurisdiction of this court, is whether respondent's defense based on this Agency Agreement was a claim to

right, privilege or immunity under a law of or under a commission held and/or authority exercised under the United States, within the meaning of Section 237 (b) of the Judicial Code, supra, as discussed below.

3. Authorities Supporting Jurisdiction.

The constant stream of litigation under the Federal Employers' Liability Act and Jones Act frequently makes it necessary for this Court to review on certiorari the decisions of state courts in order to clarify the statutory tests of liability, as well as to explain and apply its own prior decisions. *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States*, sec. 344. This Court has specifically held that the Jones Act is to have uniform application. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244.

This Court has reviewed cases under these statutes in which the sole question concerned the sufficiency of evidence of liability. *St. Louis I. M. & S. R. Co. v. McWhirter*, 229 U.S. 265, 277; *St. Louis etc. Ry. v. Mills*, 271 U.S. 344, 346; *Atchison, Topeka & Santa Fe Ry. Co. v. Saxon*, 284 U.S. 458; *Chicago Rock Island Ry. v. Wright*, 239 U.S. 548; and *Bailey v. Central Vermont Ry.*, 319 U.S. 350. This is in accordance with the long established and recently reiterated principal that where reference to the facts is necessary to the determination of the precise meaning of a federal right or immunity, as applied, the Court is free to re-examine the facts as well as the law in order to determine for itself whether the asserted right or immunity is to be sustained. *Hooven & Allison Co. v. Evatt*, 324 U.S. No. 4, 652. See also *Cornell Steamboat Company v. Phoenix Constr. Co.*, 233 U.S. 593, and *Norris v. Alabama*, 294 U.S. 587.

Thus the fact that respondent may claim in this case that the decision of the Oregon Supreme Court was based upon a determination of questions of fact whether there was evidence to sustain findings of employer-employee relationship and of negligence does not relieve this court of jurisdiction to determine the right of recovery under the Jones Act claimed by petitioner. It is to be noted, however, that the Oregon Supreme Court not only recognized the existence of the federal questions in thits case (R. 37), but expressly based its decision upon a determination of such questions. (R. 14, 28, 32, 33, 37.) Even its determination of an absence of liability on the part of respondent was based upon its construction of the General Agency Agreement (R. 37), under which respondent claims an immunity, and this alone, as we will next show, is sufficient to raise a federal question.

Basically, all contracts with the United States are to be considered and construed in the light of the federal statutes authorizing and limiting their execution and effect. It has been held by this Court that this principal applies to General Agency Agreements between the War Shipping Administration and private steamship companies. *Brady v. Roosevelt S.S. Co.,* supra. It follows that since the General Agency Agreement in question would directly affect rights of seamen under the Jones Act, the respondent, by claiming a right or immunity under the Agency Agreement is also claiming a right, privilege or immunity under the provisions of the Jones Act itself. It has been recognized that in actions under the Federal Employers' Liability Act, upon which the Jones Act is based, the protection afforded by its provisions is fully as available to employers under claim of federal right or immunity as

are the benefit of its rights available to employees. *St. Louis I. M. & S. R. Co. v. McWhirter,* supra, at 275; *Atchison T. & S. F. R. Co. v. Saxon,* supra, at 459. See also *St. Louis etc Ry. v. Mills,* supra.

Moreover, the contract in question is one under which respondent assumes to act as a general agent for the War Shipping Administration. It follows that in acting as such an agent the respondent was undertaking to act under a commission held and/or authority exercised under the United States, and that in claiming immunity under the terms of the Agency Agreement it is claiming immunity under the terms of such commission or authority. This Court has specifically held that the claim to a right, privilege or immunity by virtue of a contract between the United States and a private corporation may properly be considered as a federal question within the meaning of the Judicial Code. *United States v. Ansonia Brass etc. Co.,* 218 U.S. 452, 462-3. Other cases sustaining the jurisdiction of this Court over rights, privileges or immunities claimed under contracts with the government include the following: *Yearsley v. W. A. Ross Const. Co.,* 309 U.S. 18; *United States v. Pink,* 315 U.S. 203, 217, and *Carpenter v. Shaw,* 280 U.S. 363. See also *United States v. Allegheny County,* 322 U.S. 174, 183, holding that:

> "The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create of permit, all present questions of federal law not controlled by the law of any state."

4. Federal Question Is Substantial.

We submit that this case is not only one "where a state court has decided a federal question of substance not theretofore determined by this Court," but is also one where a state court has decided such a question "in a way probably not in accord with applicable decisions by this Court." (Sup. Ct. Rule 38, par. 5 (a).)

This is clearly a case of first impression. This Court has never decided whether a seaman injured due to negligence in the operation of a ship subject to a General Agency Agreement of the standard form involved in this case may bring suit under the Jones Act and in the State Courts against the steamship company involved. As noted below, several other cases involving the same issue have been decided by state and federal trial and lower courts but the question has not yet been directly decided by any Circuit Court of Appeals nor by any other state court of last resort. As stated by the Oregon Supreme Court with commendable frankness:

> ". . . it is apparent that there is no decided weight of authority on this important question, which must ultimately be determined by the Supreme Court of the United States." (R. 37.)

It appears from the following cases that with the inclusion of cases not considered by the Oregon Supreme Court, the majority of decisions supports the position of the petitioner and is opposed to the decision appealed from in this case: *McCormick v. Moore-McCormack Lines, Inc.*, 54 F. Supp. 399; *Gay v. Pope & Talbot, Inc.*, 47 N.Y.S. (2d) 16; *Schaller v. Matson Navigation Co.*, 43 N.Y.S. (2d) 566; 1943 A.M.C. 839; *Moss v. Alaska Packers Assoc.* (Cal. Appel. Ct.) 1945 AMC Vol. 4, 493; *Bast v. American Hawaiian Steamship Co.* (E.D.

Pa.), 1945 AMC, Vol. 4, 503. See also: *Carroll v. United States,* 133 F. (2d) 690 at 693; *Lewis v. U. S. Navigation Co.,* 57 F. Supp. 652. Cases relied on by respondent include: *Murray v. American Export Lines, Inc.,* 53 F.S. 861; *Neilsen v. American President Lines, Ltd.;* 1944 A.M.C. No. 8, 1169; *Conlon v. Hammond Shipping Co., Ltd.,* 55 F.S. 635; *Baker v. Moore McCormack Lines, Inc.,* 57 F.S. 207.

On December 18, 1942, this Court decided the case of *Brady v. Roosevelt S.S. Co.,* supra, which involved a suit in admiralty for the death of a customs inspector against a steamship company under Agency Agreement with the U. S. Maritime Commission, which owned the ship. The Circuit Court of Appeals had held that under the Suits in Admiralty Act there was no remedy against the Company and that the exclusive remedy was against the government. (128 F. (2d) 169.) This Court accepted petition for certiorari and held that neither the Suits in Admiralty Act nor provisions of the agreement between the company and the Commission removed the liability of the company in that case.

Since the *Brady* case certain changes have been made in the General Agency Agreements between steamship companies and the government. In addition, Public Law 17, supra, has been enacted. The majority cases cited above supporting petitioner's view that such actions may still be brought under the Jones Act take the position that the principles of the *Brady* decision are still controlling, unaffected by these changes. Yet the Oregon Supreme Court expressly held that the *Brady* case was not controlling over this question. R. 25-27.) We submit, however, that the decision in the *Brady* case, together with decisions by lower courts on

this question, show upon their face that there are substantial reasons for believing that the Oregon Supreme Court decided this case in a way probably not in accord with applicable decisions by this Court and that this case involves a federal question requiring analysis of federal statutes and of decisions of this Court and exposition of the same before a proper decision can be reached. *Robertson and Kirkham,* supra, at p. 97; *Milheim v. Moffat Tunnel Improvement District,* 262 U.S. 710, 716-7.

The question involved in this case is also one of great public importance. If the decision of the Oregon Supreme Court is correct thousands of American seamen will be deprived of their rights to bring suits in state courts under the Jones Act, with the guaranty of trial by jury, against the large proportion of steamship companies now operating under Standard Agency Agreements. Even if the only federal right claimed by this petitioner under the Jones Act were the right to jury trial in a state court, we submit that the loss of this right alone raises a federal question of substantial importance since it has been recognized by this Court that the right to jury trial is "part and parcel" of the remedy afforded under the Jones Act and that to deprive workers of the benefit of a jury trial is to take away "a goodly portion of the relief which Congress has afforded them." *Bailey v. Central Vermont Ry.,* supra. See also *Tennant v. Peoria & R. P. Ry. Co.,* 321 U.S. 29, 35. We also submit that there are important reasons of public policy at this time in view of the number of war contracts entered into by the federal government with private corporations and the extreme importance of many of the questions now arising under such contracts to support the position that this Court should

exercise its discretion to review by writ of certiorari the decision of any state supreme court which undertakes to pass upon the validity of any right or immunity claimed by a private corporation by virtue of the provisions of a contract with the federal government, particularly where the contract designated the company to be an agent of the government and is a standard form governing the rights of thousands of seamen engaged on hundreds of ships.

THE QUESTION PRESENTED

The ultimate and primary question presented to the Court in this case is whether this petitioner, a seaman employed on a ship operated under the standard form of General Agency Agreement effective April 4, 1942, between the War Shipping Administration and various steamship companies, has a cause of action which he may pursue in a state court under the Jones Act against such a company as the operator of the ship and as his employer for injuries received due to the negligent operation of the ship.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

In addition to the foregoing statement supporting the jurisdiction of this Court petitioner submits the following additional reasons why the Supreme Court of the State of Oregon erred in its decision and decided a federal question of substance not theretofore determined by this Court in a way probably not in accord with applicable decisions by this Court:

(1) The Supreme Court of the State of Oregon in its decision failed to follow the principle of law estab-

lished by this Court that the liability of an agent of the Federal government to a third party cannot be removed by contract.

In the *Brady* case, supra, this Court established the principles that contracts with the government must be construed in the light of the legislation enacted by Congress authorizing their execution and that the liability of a steamship company to a seaman as a general agent of the government cannot be removed by contract between the company and the government. The only distinctions between that case and the instant case are that it was an action under the Suits in Admiralty Act while this is an action under the Jones Act and that certain changes have been made in the provisions of the standard form of General Agency Agreement since the decision in that case.

The fact that the two cases arose under different statutes is a distinction without a difference for the reason that both statutes require proof of liability and mere contract provisions alone cannot absolve an agent from responsibility as an employer under the Jones Act any more than from liability for his own negligence. For the same reasons, the mere fact that certain changes had been made in the form of agreement does not relieve the agent from liability.

(2) Even assuming that it was competent for the respondent and the government to absolve the Company from such liability by virtue of the General Agency Agreement, the Oregon Supreme Court failed to properly construe and apply terms of that agreement making it clear that for the purposes of the Jones Act the Company continued to be the operator of the ship and employer of the crew.

The Agency Agreement contains specific references to the "operation" of the vessels by the general agent and makes even clearer an intent that the steamship company was to be the operator of the ship by provisions that the agent was to "manage and conduct the business of the vessels assigned to it," to "maintain" them in an efficient state of repair, to be reimbursed by the government for "claims," including personal injuries, "connected with the operation or use of said vessels," and that the ships in the "custody" of the agent were to be "turned over" to the government at the termination of the agreement. It does not purport to provide that operations, even while at sea, shall be conducted other than by the agent itself, nor does it qualify the duty of inspection and maintenance imposed on the general agent or limit that duty to times when the vessels are in port.

Although the contract, while specifying that the master shall be procured by the Company, provides also that he is to be an employee of the United States, it contains no such provision with reference to the crew, but provides only that the Agent shall "procure the crew." Although the crew is then to be referred to the Master for "engagement" this provision does not prevent him from doing so as agent for the company nor substantially alter practice previous to the revised form of agency agreement. Later provisions referring specifically to "employment" by the Agent and requiring only approval by the United States make clear that such was the intent of the term "procure." The intent that the Agent be responsible as employer of the crew is made clearer by other provisions such as that the Agent be reimbursed for wages paid as well as compensation for personal injuries.

(3) The Oregon Supreme Court also failed to properly consider other evidence in the record sufficient to sustain the findings by the jury that for the purposes of the Jones Act respondent was the employer of the petitioner, operator of the ship and liable for its negligent operation.

Evidence outside the Agency Agreement sustaining the jury findings that the respondent steamship company was the employer of seaman Hust includes pay envelopes, crew pass and muster cards all bearing the company name, tax withholding slips printed by the Company and designating it as employer, correspondence indicating that both the Company and the W.S.A. had interpreted the contract to impose liability upon the company for the claim in question, and union agreements executed prior to the Agency Agreement, designating the company as the employer of the crew, and continued in effect or "frozen" for the duration of the war.

(4) In addition, the Oregon Supreme Court failed to properly construe and apply provisions of Public Law 17, supra, confirming the intent that under standard General Agency Agreements the steamship companies were to be responsible for the purposes of the Jones Act as the employers of the crews and the operators of the ships, and were to be liable for injuries resulting from their negligent operation.

Public Law 17 and the House Report on its provisions specify that the ships under General Agency Agreements were to be operated by private steamship companies, which were to procure their crews through their customary channels, that the crews were to be only "technically" government employees, and that they

were to retain all of their rights under the Jones Act and were to have their rights determined as though in private employment, in accordance with their stated preference, to be enforced either in federal or state courts.

(5) The Oregon Supreme Court failed to recognize that companies engaged in the operation of vessels under General Agency Agreements are owners "pro hac vice" and thus liable under the Jones Act to seamen employed on such ships for injuries due to their negligent operation, regardless of whether such seamen may technically be their employees.

Argument in support of these points is included in the attached brief.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Supreme Court of the State of Oregon commanding said Court to certify to this Court a complete transcript of the record and of all proceedings of said Supreme Court of the State of Oregon had in said cause, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; that the judgment of the Supreme Court of the State of Oregon be reversed, and for such further relief as to this Court may seem proper.

Dated November 23, 1945.

B. A. GREEN
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Of Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1945

CECIL I. HUST, Petitioner and Plaintiff-Respondent below,

vs.

MOORE-McCORMACK LINES, Inc., Respondent and Defendant-Appellant below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF COURT BELOW

The opinion of the Supreme Court of the State of Oregon was filed on April 25, 1945, and is reported in 40 Or. Adv. Sh. No. 13, p. 493, 158 P. (2d) 275. (See also R. 13ff.)

JURISDICTION

In order to conserve the time of the Court petitioner adopts the statements of jurisdiction included in the preceding petition (pp. 4 to 14) as a part of this brief and will not repeat or elaborate upon said statement except to submit further argument below to support the conclusion that the Oregon Supreme Court erred in that it decided a federal question of substance not theretofore determined by this Court in a way prob-

ably not in accord with applicable decisions by this Court. (Sup. Ct. Rule 38, par. 5 (a).)

STATEMENT OF THE CASE

The statement included in the preceding petition (pp. 1 to 4) is hereby adopted and made a part of this brief for the purposes of brevity.

SPECIFICATION OF ERRORS

(1) The Supreme Court of the State of Oregon in its decision failed to follow the principle of law established by this Court in the case of *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, that the liability of an agent of the government to a third party cannot be removed by contract.

(2) Even assuming that it was competent for respondent and the government to absolve the company from such liability by virtue of a General Agency Agreement the Oregon Supreme Court failed to properly construe and apply terms of that agreement making it clear that for the purposes of the Jones Act (40 U.S.C. 688; 38 Stat. 1185; 41 Stat. 1007) the company continued to be the operator of the ship and employer of the crew.

(3) The Oregon Supreme Court also failed to properly consider other evidence sufficient to sustain the findings by the jury that for the purposes of the Jones Act, supra, respondent was the employer of the petitioner, operator of the ship and liable for its negligent operation.

(4) The Oregon Supreme Court failed to properly construe and apply provisions of Public Law 17 (50

U.S.C. App. Sec. 1291; 57 Stat. 45) confirming the intent that under standard General Agency Agreements the steamship companies were to be responsible for the purposes of the Jones Act as the employers of the crews and operators of the ships, and were to be liable for injuries resulting from their negligent operation.

(5) The Oregon Supreme Court failed to recognize that companies engaged in the operation of vessels under General Agency Agreements are owners "pro hac vice" and thus liable under the Jones Act to seamen employed on such ships for injuries due to their negligent operation, regardless of whether such seamen may technically be employees of the government.

ARGUMENT

Summary of Argument

As a summary of the argument under each of the above specifications of error petitioner would refer the Court to the statement of "Reasons Relied Upon for Allowance of Writ," included in the preceding petition (pp. 14 to 18) and adopts the same as a part of this brief.

Point I. The Supreme Court of the State of Oregon Failed to Follow the Principle of Law Established by This Court That the Liability of an Agent of the Government to a Third Party Cannot Be Removed by Contract.

This court in the case of *Brady v. Roosevelt Steamship Co.*, supra, recognized two basic principles of law: (1) That contracts with the government must be construed in the light of the legislation enacted by Congress

authorizing their execution, with the result that substantial changes in the rights and duties of government agents to third parties will not presumed in the absence of an expression by Congress in unambiguous terms, and, (2) that the liability to a seaman of a steamship company operating as a general agent of the government cannot be removed by changes in the provisions of the contract between the company and the government.

Obviously, the War Shipping Administration, in devising and entering into the standard form of General Agency Agreement with the various steamship companies, including respondent, could not exceed the powers conferred by the government upon that agency. Under Executive Order 9054, 7 F.R. 837 and 7327 (50 U.S.C.A. Appendix, p. 547), establishing the War Shipping Administration it was made clear in section 2(a) that the War Shipping Administration should do no more than to "control the operation—and use" of all merchant ships under the flag or control of the United States, while in Section 3 it was provided that the W.S.A. should exercise the same powers and duties with respect to the *operation* of ships as previously conferred upon the U. S. Maritime Commission under the Merchant Marine Act of 1936 (46 U.S.C. Chapter 27, sec. 1101ff; 49 Stat. 1985). (See also Sections 2 (i) and (k) of the Executive Order.) Although Section 9 authorizes the employment of necessary personnel for the W.S.A. itself, it is obvious that this provision does not authorize the employment of crews by the W.S.A. as its employees for the ships whose operations it was to control and petitioner has found no appropriation by Congress for the payment by the W.S.A. of wages to crews, as employees of the W.S.A. On the contrary, as made clear

by Article 7 of the contract itself (Ex. 21, R. 155) the W.S.A. was only to reimburse the general agent for payment as an expense of operation of wages of the crew, which under Article 3 A (d) was to be procured by the agent.

The Merchant Marine Act of 1936, which was the statute authorizing the contract involved in the *Brady* case and which by reference in Executive Order 9054 is also the controlling statute over the contract in this case, also contains provisions making clear an intent by Congress that the government, through the Commission, although permitted to acquire and own vessels, should, insofar as possible, enter into contracts providing for the operation of such vessels by private steamship companies. See Sections 1101 (c), 1120 (2), 1171 (a) (3), 1194, 1195, 1203, 1211 and 1225. Likewise, this Act makes no provision for employment by the Commission of crews for the ships under its control, but only for employment of personnel to discharge its administrative functions. Section 1111 (e) makes this intent particularly clear. On the other hand, Section 1131 (2) and 1132 (e) make it clear that although the Commission was to control wages and working conditions for the crews on ships operated under contract with it, they were to be employed by the contracting steamship companies engaged in the operation of such ships. It was also provided by Section 1128 (f) that the rights of seamen under existing law were not impaired by its provisions.

Petitioner has not discovered and respondent has not claimed that there were any changes, since the date of the trial and decision in the *Brady* case, either by statute or executive order, in the legal authority under

which the General Agency Agreement in this case was executed and which would affect the outcome of this case. We thus submit not only that the basis of the liability of a steamship company engaged as a general agent of the government remained the same, but also that there was no authority for the W.S.A. to enter into a contract which, as interpreted by the respondent, would provide that the W.S.A. itself should be the employer of the crews for the ships subject to the contract, thereby divesting the steamship companies from any liability to members of the crews of ships assigned to them for operation.

There is also no evidence in the record of this case of any substantial changes since the *Brady* case either in the general practices for the operations of ships under General Agency Agreements with the government or in the practices relating to the employment of their crews which would affect the outcome of this case. On the contrary, the practice for crews to sign the shipping articles in the presence of the U. S. Shipping Commissioner and the Master of the ship had existed by statute since 1898; 46 U.S.C. sec. 713; 30 Stat. 762, 764; 38 Stat. 1168. See also Ex. 13; R. 142). Section 3A (d) of the contract specifically provided that the crews were to be procured "through the usual channels and in accordance with customary practices." (Ex. 21, R. 151.) In addition, as shown below (pp. 40 to 43) there were union agreements in effect between the steamship companies and unions, the term of which had been continued and "frozen" for the duration of the war.

Thus, the only distinctions between the *Brady* case and the instant case are: (1) That it was an action

under the Suits in Admiralty Act, while this is an action under the Jones Act, and (2) That certain changes have been made in the provisions of the general agency agreements since the decision in the *Brady* case.

The mere fact that the two cases arose under different statutes is clearly a distinction without a difference so far as the question involved in this case is concerned for the reason that the primary question in both cases was one of liability for personal injuries and whether the provisions of the General Agency Agreements provided immunity from such liability. Both statutes impose liability on ship operators for their negligent acts and mere contract provisions alone cannot absolve an agent from responsibility as an employer under the Jones Act any more than from liability for negligence where no question of the employer-employee relationship is involved. For the same reasons, the mere fact that certain changes had been made in the form of the agreement does not of itself operate to relieve the agent from liability to a third person either as an employer of a seaman or as one otherwise responsible for the negligent operation of a ship.

One of the most significant points of this case, however, is that the Oregon Supreme Court in deciding both the question of the employer-employee relationship and that of responsibility for the negligent operation of the ship relied primarily upon the provisions of the contract between respondent and the W.S.A. and, as will be noted below (pp. 34, 35), in a large measure upon the language of one section, namely section 3A(d). We think it fair to state from an analysis of this decision that in the absence of that one section and the presence of a provision such as in the *Brady* case, in which the

agent agreed to man the ship and was more clearly in charge of its operations (R. 20; and Footnote 1 of the *Brady* case supra), that the company was liable both as employer of the crew and as responsible for the negligent operation of the ship. Thus, we submit, the Oregon Supreme Court failed to accept and properly apply the principle established by this Court in the *Brady* case that the liability of an agent of the government to a third party cannot be removed simply by changes made in the Agency Agreement.

On the other hand, the majority of courts which have thus far passed upon this problem have regarded the principles established in the *Brady* case as absolutely binding and controlling and as requiring a decision that general agents under such agreements continue to be under liability to the crews of such ships both as their employers and as responsible for the negligent operation of the ships. See *Gay v. Pope & Talbot, Inc.*, 47 N.Y.S. (2d) 16; *McCormick v. Moore-McCormack Lines, Inc.* (E.D.Pa.), 54 F.S. 399; *Moss v. Alaska Packers Assn.* (Cal. App.) 1945 A.M.C., Vol. 4, 493; *Bast v. American Hawaiian S.S. Co.* (E.D.Pa.), 1945 A.M.C., Vol. 4, 503; and *Schaller v. Matson Navigation Co.*, 43 N.Y.S. (2d) 16; 1943 A.M.C. 839. The principal case relied on by respondent, that of *Murray v. American Export Lines, Inc.* (S.D.N.Y.), 53 F.S. 861, is clearly not controlling for the reason that, as pointed out in the *Gay* case, supra, the plaintiff there conceded that the only negligence was that of a fellow servant and that both he and the plaintiff were employed by the United States.

We thus submit that the language of this Court in the *Brady* case must be taken to mean, in accordance with what it says, that an agent, such as the respondent,

and a government commission, such as the W.S.A., may not enter into a contract between themselves which would operate to deprive seamen of the rights for which they struggled so many years and in respect to which their efforts were finally rewarded by enactment of the Jones Act. The rights of seamen thus acquired are basic and it would seem strange indeed if Congress should authorize one of its governmental commissions to contract away these rights without some statutory enactment expressly authorizing such action.

Point II. Even Assuming That It Was Competent for Respondent and the Government to Absolve the Company from Liability by Virtue of a General Agreement the Oregon Supreme Court in Its Decision Failed to Properly Construe and Apply Terms of That Agreement Making It Clear That for the Purpose of the Jones Act the Company Continued to Be Responsible as the Operator of the Ship and Employer of the Crew.

Before discussing the particular provisions of the General Agency Agreement (Ex. 21, R. 116, 149) we submit that this Court should bear in mind a few of the salient facts composing the background of that agreement. By Executive Order No. 9054, dated February 7th, 1942, the President of the United States established the War Shipping Administration to assure the most effective utilization of the shipping facilities of the United States for successful prosecution of the war. Thereafter the War Shipping Administration requisitioned and/or otherwise acquired jurisdiction of hundreds of cargo vessels. The appellant company, as one of the larger of the shipping companies, then received allocation of numerous cargo vessels, including the "MARK HANNA." (Def. Ex. 21, R. 116, 149.) The

appellant company had for many years prior to the advent of the war been engaged in the operation of ships carrying freight between ports of the United States and other ports throughout the world. (R. 6.) It had an operating organization, highly experienced in all phases of the shipping industry and maintained offices and operating personnel in all major ports of the world. (Ptf. Ex. 17, R. 129, 145.) The War Shipping Administration, on the other hand, had had no experience in the operation of ships; it had no organization or personnel suited to such purpose, as is apparent from the provisions of this executive order as well as of the Merchant Marine Act of 1936, both of which are referred to above.

A. Contract Provisions Establishing Respondent as Operator of the Ship.

Perhaps the most important single issue in this case is whether respondent company was the operator of the ship. If respondent was in fact the operator of the ship, it follows that it had control over the crew so as to constitute it as employer of the crew, at least for the purpose of performing its charter under the agreement, and, in addition, that it was responsible for the condition of the ship throughout the voyage, including the facts causing plaintiff's injury. It is obvious that the actual operation of a ship can only be performed for the operator by its crew.

Article 1 states that the General Agent shall "manage and conduct the business of the vessels assigned to it," making it clear that, although acting as agent, the physical possession of the ships is turned over to the steamship company and they are physically operated by it. (R. 150.)

Article 2 is to the same effect. It speaks also of the assignment of vessels to the Agent and its acceptance of such vessels, making further clear an intent to transfer physical possession of the ships. While stating that the Agent shall act in accordance with regulations issued by the government, such regulations would only be pertinent to this case if they were to the effect of stripping the Agent of power of operation of vessels during their voyages. (R. 150-1.) As we shall see, there were no contract provisions to that effect and, as we have already seen, all statutes and regulations were to the contrary effect, namely, that the Agent was to be the operator in fact of the ships.

Article 3A (a) imposes on the Agent the duty of maintaining the vessel, subject to orders as to voyages, cargoes, rates and all matters connected with the use of the vessels or in the absence of orders to follow reasonable commercial practice. (R. 151.) This makes it even clearer that the Agent is to be the actual operator of the ship, subject only to orders from the government and that it was to exercise its discretion in the absence of such orders. Reference to "voyages" and to "use of the vessels" could have no meaning aside from operations during voyages.

Article 3A (d) provides that General Agent shall procure the Master, subject only to approval by the government. (R. 151.) Thus the Agent is left free to designate its own employees as Masters, remove them if they are not satisfactory and appoint successors, provided only that the successors are approved by the W.S.A. The fact that the Master is to become an employee of the United States does not mean that he cannot at the same time be an agent for the Company.

Indeed, as a practical matter, the company could not discharge its duties under the contract, as discussed below, unless the Master were its agent for these purposes.

Articles 3A (c), 4 (a) and 7 refer to the maintenance of the vessels by the general agent, the keeping of records by it of the management, operation, conduct of business of such vessels, including statements of operation, and also provide that the government shall reimburse the agent for all expenses, with certain limited exceptions, including expenses for the maintenance, management, operation or the conduct of the business of the vessels. It is to be noted that the term "operation" is used without qualification along with maintenance and other duties imposed on the Agent and ordinarily performed in connection with the operation of ships. See R. 151, 154, 155.)

Article 6 deals with the selection of agents by the General Agent and with the assignment of vessels by it to berth operators. R. 154.) If the Agent did not have control and operation of the vessels it obviously could not assign them to others. Moreover, the authority to select agents can have no meaning except in the discharge of the duties of the General Agent under the contract and there is thus no reason why it should not have designated agents among the officers of the ship including at least the Captain and purser, to discharge its duties while at sea or abroad.

Article 14, in imposing the duty to maintain the vessel in an efficient state of repair and to exercise reasonable diligence in making inspections for that purpose. (R. 159.) No qualification is made to relieve the agent of this duty while the vessel is on voyage. The term

"maintain" of itself connotes a continuing duty as is one normally incident to the operation of a ship.

Article 16 provides that the Agent shall be indemnified for claims, including personal injuries, "connected with the operation or use of said vessels." (R. 160.) Similarly, Article 8 provides for insurance of the Agent against insurable risks of all kinds. (R. 156.) Even if it be held that a provision for indemnity or insurance is not an admission of liability, it must be conceded that this provision could have no meaning unless the Agent were intended to be the operator in fact of the vessel. It fits in perfectly with the effect of the other provisions listed above and this effect that the Agent shall not be the operator in fact of the ship during its voyages.

Merely because such operations are to be conducted in accordance with strict wartime government orders and regulations cannot of itself defeat the responsibilities of the Agent in conducting such operations any more than for any private company operating in time of war with government owned equipment and under government supervision. Likewise, the mere fact that the Master is to have full control and responsibility for the "navigation and management of the vessel," as provided in *Article 3A (d),* does not contradict this fact for the reason that under maritime law the master of a ship always has this power and responsibility, regardless of the person liable as owner or operator of the ship in the event of accident. Such a provision is even more natural in time of war and if it has any special meaning must have been intended to refer to laying the ship's course and to navigational problems arising under wartime conditions. Thus, such a provision

is wholly immaterial to the issues of whether the agent is the operator of the ship for all normal purposes.

The conclusion that the company was in fact the operator of the vessel is even more conclusively established by *Articles 11 and 12* dealing with termination of the contract and which provide that the government may terminate the agreement and "assume control" of the ships and that the ships "in the custody of the General Agent pursuant to this agreement" shall then be "turned over" to the United States, although the Agent may be required to complete the business of voyages commenced prior to the date of termination. R. 157-8.) These provisions make clear the intent that until such time control over the operations of the ships was to be vested in the Agent Company. If the ships were being operated in fact by the government and not by the Agent, the Agent would not have their physical custody and could not "turn them over" to the party which was already operating them. Moreover, the provision that the Agent may be required to complete the business of voyages undertaken prior to termination shows a clear recognition that while en route the ships are operated and controlled by the Agent.

B. Contract Provisions Establishing Defendant as Employer of the Crew.

We again submit that once it is established that the Agent is the operator in fact of the vessel that fact alone is indicative of a sufficient measure of control over the crew to make the operator responsible as their employer. In this case, however, the Oregon Supreme Court would hold that this result is prevented by *Article 3A (d)* of the contract, which

designates the master as an employee of the United States and gives him control over the ship while at sea. (R. 21.) This makes necessary a re-analysis of that provision.

Although, as pointed out above (supra, p. 29), the Master was procured by the Company under *Article 3A (d)*, there is nothing to prevent the Master from also being the agent of the Steamship Company for the purpose of carrying out the duties imposed upon it by the contract and which could not be performed by the Company, as a practical matter, unless the Master were its agent. It follows that the Master, as agent for the company responsible under the contract for the operation of the ship, as we have seen, then engages a crew not only to enable him to carry out his duties to the United States in connection with the navigation of a ship in time of war, but also on behalf of the Company in order to enable him to carry out the duties imposed on the company by the contract, including the operation of the ship. There is, of course, nothing to prevent a person from being an employee of two masters at the same time.

Moreover, the fact that the Master is stated in that section to be the employee of the United States does not necessarily mean that the crew is also employed by the United States. The intent that the crew were not to be employees of the United States, at least exclusively, is made clear beyond doubt by the fact that although the Master is designated as an employee of the United States there are no similar words indicating that the crew are employees of the United States. It is provided only that the Agent shall "procure" the crew for "engagement"

by the Master. Had the parties intended that the crew then become solely the employees of the United States it would seem natural that the careful draftsmen who prepared this agreement would have stated that they, like the Master, should be employees of the United States. One of the cardinal principles of statutory construction is that of "expressio unius est exclusio alterius." The conclusion reached by application of this principle to *Article 3A (d)* is further supported by other provisions of the agreement showing an intent that the Agent be at least a joint employer of the crew for purpose of performing the duties imposed upon it by the agreement.

As the Court must recognize, one isolated and at best ambiguous provision of a contract cannot alone be looked to to strip thousands of seamen of their long established rights, but must be viewed in the light of the contract as a whole, as well as in the light of controlling statutes, regulations and established legal precedent. As this Court well knows, contract provisions are, if possible, to be construed not only to establish harmony with other provisions of the same contract as well as controlling statutes, but also in a manner that will not render the contract illegal or invalid. Such a construction of *Article 3A (d)* is all that we ask in this case.

But while paying lip service to this rule the Oregon Supreme Court would dismiss the plain implications of the other contract provisions relied upon by petitioner because, in the view of the Court, they are not consistent with what the Court views as the meaning of one isolated section, *Article 3A (d)*. (R. 21.) We submit that this is to make "The tail wag the dog."

particularly when the language of the additional contract provisions mentioned above and below is considered and when the peculiar language of *Article 3A (d)* is fully noted and understood, as explained above. To hold that this section alone results in the conclusion that the Agent is not the operator of the ship while at sea nor the employer of the crew is to place wholly undue emphasis on a provision which can reasonably be construed in a way entirely consistent with other provisions showing an intent to constitute the Agent as the operator of the ship and at least as the joint employer of its crew.

To go further and state, as would be held by the Oregon Court (R. 21) that the Agent could not maintain or repair the ship while at sea because "it had no servants or employees on the vessel to do this work" begs the entire question whether the crew were the employees of the defendant, even for the limited purpose of discharging its duties under the agreement. It also ignores the probability that the General Agent would, under *Article 6,* designate agents among the officers or crew to discharge its duties while the vessel was at sea or abroad. (R. 154.) Any other conclusion would not only conflict with the plain meaning of other provisions of the contract, but would also result in a construction of the contract granting immunity from suit in violation of the principle established in the *Brady* case.

Article 7 of the contract provides that the Agent shall be reimbursed for "wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss of personal effects, maintenance, cure, vacation allowances, damages or compensation for death or personal injury or illness. (R. 155.) It

is hard to conceive of a more complete cataloging of the responsibilities of a maritime employer to his employees. Furthermore, this provision makes it clear that the functions giving rise to each of these possible liabilities is to be performed by the Agent. Moreover, this section provides for reimbursement for Social Security taxes paid by the Agent as agents or otherwise. Since, at least prior to Public Law 17, Social Security taxes could be assessed only for private employees and not for government employees this makes even clearer an intent that the Agent be regarded as employer of the crew. There are no contract provisions indicating a contrary intent. A further indication of this intent is that if disputes arise over these matters they are to be negotiated and settled by the Agent, who is the employer-party to labor agreements about which more will be said later.

Likewise, the provision on reimbursement for compensation for personal injuries could have no effect if, as contended by the Company, all such claims are to be presented to the W.S.A. for payment. Payment by the Agent and reimbursement by the government is wholly consistent with such a theory. It is also to be noted that this provision is included in an Article dealing exclusively with reimbursement for obligations of the Agent to the crew, making clear beyond doubt an intent to thus provide for payment by the Agent for personal injuries of members of the crew.

Article 16, dealing with reimbursement to the Agent for claims arising from operation or use of the vessel, including claims for personal injury, maintenance and cure further emphasizes the intent that claims for injuries to crew members should be presented to and paid

by the Agent, rather than to the W.S.A. as urged by defendant. (R. 160.)

Further indications of an intent that the Agent perform the duties of an employer and be so regarded appear from *Article 18(b)*, which prohibits the Agent from discrimination on account of race, creed, color or national origin; and *Article 16d*, which relieves the Agent from liability growing out of labor shortages. (R. 161-2.) These provisions make it clear that the initial "procurement" of the crew by the Agent constituted their employment for all practical purposes and that the function of the Master was only to formally "engage" them in accordance with long-standing custom, thereby approving those hired by the Agent.

The most that can be said is that the crew, while perhaps becoming technically employees of the United States for the purpose of satisfying the need for strict discipline and controls in time of war, were at the same time employees of the Agent for all other purposes and in the more practical and realistic sense, indicating the normal and customary relation between the crew and the general agent which operated the ship, procured the crew, paid their wages, paid for their injuries and negotiated disputes with their union. The fact that the Agent was reimbursed for such expenses by the government can of itself no more controvert this relationship than would reimbursement of labor costs to a "cost plus" contractor. Thus it was held in the case of *Moss v. Alaska Packers Assn.*, supra, referring to the effect of the General Agency Agreement on this question:

> "It would seem, therefore, that the spirit of the agreement, as well as its letter, is that seamen

retain their status as servants of the private ship owners."

We also think it to be of extreme significance that the two principle federal labor agencies with jurisdiction over labor problems involving seamen and which have no jurisdiction over employees of the government have apparently taken the uniform position that under such General Agency Agreements the steamship companies continue to be the employers of the crews. Thus a panel of The National War Labor Board in the case of *Atlantic & Gulf Coast Agents and Pacific American Assn.*, 16 W.L.R. 23, May 6, 1944, involving some 35 companies, including the Moore-McCormack Lines, was confronted with the objection by the companies that the Board had no jurisdiction for the reason that "the United States, not the general agents, is the employer . . ." The panel pointed out that the W.S.A. had directed the steamship companies to negotiate contracts with the unions and that the NLRB had ruled that a general agent of the W.S.A. is the employer of the crews. Despite objection by the companies the Board adopted the panel report and assumed jurisdiction over the case, deciding, among other things, that seamen remained subject to discharge by the agent steamship companies if not satisfactory to the companies, as well as fixing wages and working conditions to be adopted by the companies and unions as parts of their working agreements. Since then the War Labor Board has made several other decisions in disputes between the same steamship companies and the unions and has made further changes in wages and working conditions. For example, see *Pacific American Shipowners Assn.*, 14 L.R.R. 814 and 16 L.R.R. 790.

Likewise, in the National Labor Relations Board case of *Barge Carriers, Inc.*, Case No. 10-C-1382, reported in *Lawyers Guild Review*, March-April issue, 1944, at page 38, the companies set up a similar defense, but the examiner held as follows:

> "The acquisition by the WSA of the vessels and the execution of the General Agency Agreement effected no change in the relationship betwen the respondent and the employees here concerned. Nor, despite the control exercised by the WSA over the sailings and cargo of the vessels, has there been any change in, or attempt by the WSA to change the working conditions of the employees. Realistically, it is plain that the labor policies concerning these seamen are controlled entirely by the respondent, under only minimal supervision of the WSA. The creation of the WSA and the vesting in it of control over the shipping of the United States was a temporary measure designed to utilize more effectively such shipping for the prosecution of the war. The control exercised by the WSA over the respondent's operations has been concerned largely with voyages and cargo, and not with labor relations. In excepting the United States as an employer from the application of the (N.L.R.) Act, the Congress cannot have intended, the exception to apply to a situation in which, for all practical purposes, the essential elements of the employer-employee relationship remain in the control of the private operator, under only nominal aid and temporary supervision of the WSA."

Point III. The Oregon Supreme Court Also Failed to Properly Consider Other Evidence Sufficient to Sustain the Finding by the Jury That for the Purposes of the Jones Act Respondent Was the Employer of the Petitioner, Operator of the Ship and Liable for Its Negligent Operation.

First, let it be said that plaintiff has never agreed that the question of the employer-employee relationship in this case is purely one of law, as indicated by the Oregon Supreme Court (R. 25). Surely this Court is realistic enough to know that even though a contract by its terms designates a party as an employer or an independent contractor and even goes further and provides that he shall have certain powers, the determination whether he is in actuality an employer or an independent contractor depends as much upon what is actually done under the contract as upon its bare terms. The contract is but one of the elements to be considered in this connection. Thus, the Courts have declined to state any hard and fast rule for determining the existence of the employer-employee relationship, but rely upon the application of various tests such as control, hiring, payment of wages, and power to discharge, all of which in effect call for determinations of fact as well as low.

A. Collective Bargaining Agreements Between Company and Unions.

The record shows that at the time of the accident in this case respondent company was under at least five collective b rgaining agreements with various unions, all of which designated the Moore-McCormack Lines, Inc. (or the Pacific Republic Lines, its prototype on the Pacific Coast, R. 101), as one of the "employers."

(See Ex. 14, 15, 18, 19, 20. Admitted R. 114, 115. By agreement of counsel these union agreements were not printed, although remaining as parts of the record. R. 177.) It is true that subsequent to the execution of these contracts the unions signed a so-called "Statement of Policy" setting forth Section 3A (d) of the General Agency Agreement, "freezing" the terms of union contracts for the duration of the war, agreeing that the unions should "cooperate" with the War Shipping Administration in maintaining discipline aboard ship and not exercise their right to strike. (See R. 167-8. Nothing in this statement indicated, however, that this statement was to be anything more than indicated by its title, namely, a mere expression of policy. There was nothing to indicate that the W.S.A. was to be substituted for the companies as the employer under the union contracts and it was made clear not only that the crews would be procured by the agents in the usual manner, but that disputes should be settled by collective bargaining between the companies and the unions as set forth in their agreements. (Idem.)

As stated in the *Moss* case, supra, in holding that under the General Agency Agreements the crews continued to be employees of the steamship companies and in commenting upon this "Statement of Policy":

> "The Statement of Policy announced by the War Shipping Administration, in explanation of that part of the service agreement, having to do with the hiring of merchant seamen, specifically provides that agreements between unions and private ship owners be continued and that seamen be employed pursuant to such agreements."

Conclusive evidence of the fact that neither this Statement of Policy nor the General Agency Agreement itself changed the employer-employee relationship previously existing between the steamship companies and union members is to be found in the fact that the companies and unions continued to bargain as employer and as employee-representatives. Thus these parties proceeded later to negotiate supplemental agreements for overtime pay to seamen (See Ex. 15, p. 64, R. 114; Ex. 20, p. 20, R. 115); (see also Ex. 14, pp. 33-5). In addition, as previously noted the National War Labor Board continued to take jurisdiction over disputes between the companies and unions and to regard the companies as the employers of the crews.

The Oregon Supreme Court, however, took the position that because the Statement of Policy set forth Article 3A (d) of the Agency Agreement, extended the duration of collective bargaining agreements and contained certain restrictions on the activities of the crews, it was brought home to the Unions that the W.S.A. had taken over the companies' status as employer. (R. 24-5.) We submit that this holding is particularly vulnerable in that it not only begs the question of the effect of Section 3A (d) and of the Statement of Policy, but also assumes that the unions at the time they signed the statement had a clear understanding of the meaning and effect of these contract provisions in accordance with the position later taken by this respondent.

To attribute to the union an understanding of a contract concerning which the Oregon Supreme Court has admitted that the Courts themselves are in irreconcilable conflict at the present time and to go further and

assume that they must have agreed with an interpretation of those provisions directly contrary to their interests goes wholly beyond the limits of reality and human experience. It is far more reasonable to assume that the unions understood that the Statement of Policy meant what it said in stating that union contracts were to be frozen for the duration and that this included "freezing" of the employer-employee relationship between private companies and union members. The most that can be fairly inferred is an understanding that although the union would continue dealings with private operators and that although such operations would continue to deal with the unions in many customary ways, the United States was to assume a portion of the employer prerogatives deemed necessary for wartime controls, which were to be shared by the government and operators as joint employers. Moreover, the mere fact that the W.S.A. ordered the extension of the union contracts is no different than similar orders frequently issued by the War Labor Board to employers and unions concerning whom there is no question of intervention by the government as employer.

We thus submit that if lawyers and judges cannot agree on the effect of Section 3A (d) or of the Statement of Policy it cannot be said that unions having notice of their terms were thereby put on notice that the steamship companies were no longer responsible as the employers of seamen. Much less can it be said that it would thereby follow that all common seamen would be put on notice of these same facts to the extent of disclosure required in the case of *Lewis v. U. S. Navigation Co., Inc.*, 57 F. Supp. 652 at 655.

B. Other Evidence of Liability.

1. Payment of Wages.

The record shows that wages were paid in cash in envelopes bearing the name of the company. (Ex. 2c, R. 54, 141.) The Oregon Supreme Court dismisses this by accepting the company statement that these envelopes were used as a matter of economy because they were on hand (R. 22). Yet the company witness was unable to testify that such material was not printed after the Agency Agreement of 4-4-42 (R. 118-22) and the fact remains that the company paid the crew wages in such envelopes. Moreover, it is not disputed that bonus payments were paid by checks issued by and on the company (R. 62). This exhibit also shows that actual deductions were made for social security taxes, which is entirely inconsistent with respondents' claim that the crew were government employees, at least prior to passage of Public Law 17. Thus it is clear that this element of the employer-employee relationship points toward employment by the company.

2. Crew-Pass and Muster Cards.

The Oregon Supreme Court recognizes that seamen were given crew pass and muster cards by the chief mate bearing the company name (Ex. 1; R. 52, 141), but states that there was nothing to show that the issuance of such cards were authorized by the defendant as its own act. (R. 22.) We submit, however, thit it is highly strained to assume that the chief mate had no authority from the company to issue these cards. It is not only in accord with the presumption of legality but also in accord with contract provisions and other evidence pointing toward defendant as the operator of the ship and employer of the crew to infer that the

chief mate was furnished with such forms by the defendant and issued them as its agent appointed in accordance with authority granted in Section 6 of G.A.A. 4-4-42.

3. Withholding Tax Forms.

It is conceded that the company issued to a member of the crew a printed U. S. Treasury tax withholding form in which the company name appears under the words "employer by whom paid" and that for the purpose of this tax the defendant was deemed to be an employer. (Ex. 16; R. 109, 144, 22.)

4. Correspondence Between W.S.A. and Company Regarding Claim by Petitioner.

There was introduced in evidence correspondence to show not necessarily an admission of liability, but the practical construction which the War Shipping Administration and the respondent Company had placed upon the agency agreement with particular reference to the obligation of the Company to adjust and/or litigate claims for damages which might accrue in respect to operation of the vessel by the agent operator. (Ex. 17, R. 129, 145-8.) Examination of the correspondence in question will reveal the statement of the general counsel for the W.S.A. that:

> "It would seem that this event is clearly a marine risk and that, therefor, it is a matter to be taken up by you with your marine P. & I. Underwriters." (R. 147.)

It was petitioner's contention at the trial that the foregoing language of the Assistant General Counsel, followed by compliance with the instructions thereby given, evidenced an interpretation of the contract by

both parties to the contract that the obligation and duty of adjustment of claims for damages was imposed by the contract upon the general agent. When the Assistant General Counsel stated that Respondent's claim was a marine risk and that "therefor" it should be referred to the Company's own P. & I. underwriters, that constituted a construction of the General Agency Agreement that those risks which were not war risks, should, under the Agreement be adjusted, and/or litigated by the general agent in cooperation with its own P. & I. Underwriters. We take it that a claim for damages may be adjusted in one of two ways, i.e., by compromise or by litigation. In the process of compromising a claim, the company's claim agent and the representatives of the P. & I. Underwriters would, we assume, carefully investigate the facts attending the claim, both as regards liability and the extent of injury.

It would seem anomalous indeed that the claim agent for the operating company, in cooperation with the P. & I. Underwriters, should undertake the processing of a claim for damages and when negotiations for settlement should fail, wash their hands of the entire matter by simply instructing the claimant to assert his claim against the War Shipping Administration by filing an election so to do under General Order 32. Such a procedure would be awkward and impracticable and nothing will be found in the contract or under the pertinent legislation and or executive orders which would give sanction to such an unusual procedure. That the Assistant General Counsel was correct in his conclusion that the defendant Company should as a part of its duty under the Agreement, undertake adjustment of the claim through its own P. & I. Underwriters is evidenced

by Article 7 of Agency Agreement wherein it is provided that:

> "To the extent not recovered from insurance, the United States shall also reimburse the general agent for all crew expenditures—including, without limitation, all disbursement for or on account of . . . . damages or compensation for death or personal injury, . . ." (Ex. 21; R. 116, 155.)

We call particular attention to the clause, supra, "to the extent not recovered from insurance." That language would seem clearly to imply that before the general agent might receive reimbursement upon a crew expenditure involving damages or compensation for personal injury, the general agent must first recover from the P. & I. Underwriters the amount of their liability and that any excess above that amount that the general agent might be required to pay would, by the same token, entitle the general agent to reimbursement therefor. We can well understand why the general counsel for the War Shipping Administration directed the agent to undertake adjustment of the claim with appellant's own underwriters because the United States had paid premiums to the P. & I. Underwriters covering this liability and therefore the primary obligation was that of appellant's own P. & I. Underwriters. It would seem to follow as a corollary too, that since the P. & I. coverage was taken out in the name of the general agent, that the claim should be asserted against the general agent, initially upon an attempt to compromise and finally upon an action against the general agent should negotiations for compromise fail.

5. Evidence of Responsibility for Negligent Operation of Ship.

We submit that there can be no denial that the absence of the customary light in the ship's locker and the absence of the customary guard chain around the otherwise unguarded hatchway through which petitioner fell furnished ample evidence to sustain the jury's verdict which necessarily included an implicit finding of negligence in the maintenance of the ship (including the failure to furnish a safe place for petitioner to work), as well as of negligence in the general operation of the ship. As noted above, the Agency Agreement expressly imposed upon respondent the duty to maintain the vessel, as well as to operate it. (Supra, pp. 30, 31.)

In addition, respondent admitted in its answer "that at the time of the accident alleged it was operating the Liberty ship "S.S. MARK HANNA" for and on behalf of the United States of America, represented by the War Shipping Administration, under a written Agency Agreement prescribing and limiting the duties, authorities and functions of this defendant." (Dfts. Answer Par. I, R. 6; see also testimony of defendant's witness Tripp, R. 116.) We submit that this constitutes an express admission that respondent was the operator of the ship, that it was therefore responsible for its negligent operation, and that this admission, together with the other evidence that respondent was the operator and that the ship was negligently operated and maintained, furnished ample basis for the jury's verdict that respondent was liable for the injury which clearly was the proximate result of such negligence.

The Oregon Supreme Court, however, would hold that there is no evidence that the ship was not properly equipped when it started the voyage nor that respondent was responsible for the order directing petitioner to enter the locker, and that since under the Agency Agreement it was merely to procure the master and crew for employment by the United States it was not responsible for their conduct to the petitioner. (R. 37.) The Court held moreover that the admission of operation of the ship did go further than the extent authorized in the Agency Agreement. (R. 38.)

It is evident that this position begs the entire question whether respondent was the operator of the ship and, as such, responsible for negligence in its operation, as well as the question of whether the crew were its employees, at least for the purpose of discharging its duties of operation and maintenance. Moreover, it is evident that the Court denied relief primarily upon the provisions of the General Agency Agreement, as it construed those provisions as limitations upon the responsibility of the company as operator of the ship. In so doing the Court again refused to recognize and apply the rule recognized by this Court in the *Brady case,* supra, that a steamship company cannot escape liability to a third party by virtue of contract provisions with the government.

Finally, as we will demonstrate below, a steamship company under General Agency Agreement with the War Shipping Administration thereby becomes the owner "pro hac vice" of the ship and as such is fully responsible for all injuries resulting from negligent maintenance or operation.

Point IV. The Oregon Supreme Court Failed to Properly Construe and Apply the Provisions of Public Law 17 Which Confirmed the Intent That Under Standard General Agency Agreements the Steamship Companies Were to Be Responsible for Purposes of the Jones Act as the Employers of the Crews and Operators of the Ships, and Were to Be Liable for Injuries Resulting From Their Negligent Operation.

While it is true that Public Law 17 (50 U.S.C. Sec. 1291; 57 Stat. 45), otherwise known as the War Shipping Administration Classification Act, contains references to members of crews on ships under General Agency Agreements as employees of the United States, we submit that a consideration of the Act as a whole, together with the House and Senate Reports upon the Act, show an unmistakable intent by Congress to preserve inviolate the rights of seamen under the Jones Act against private steamship companies.

Section 1 (a) of the Act provides, in part, that:

> "Officers and members of crews . . . employed on United States . . . vessels as employees of the United States through the War Shipping Administration shall, with respect to . . . (2) . . . injuries . . . have all of the rights . . . under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels . . ."

We agree with the conclusion of the Oregon Supreme Court that the Act creates no new rights for such seamen as against general agents. (R. 32-3.) Our point of difference is that we contend that Congress

in House Report No. 107, 78th Congress, 1943 A.M.C. 611, recognized that seamen on merchant ships under General Agency Agreements had such a right prior to Public Law 17 and that such right was not affected by the passage of that Act. One of the principal purposes of the Act was simply, as its names implies, to "clarify certain provisions of law." (See preface to Act.) The Oregon Supreme Court would hold, however, that the very enactment of Public Law 17 is inconsistent with petitioners' position since if seamen already had a right to sue general agents under the Jones Act no such legislation was necessary. (R. 27-8.) The answer is that the Act intended merely to "clarify" previously existing rights and duties, as noted above. Thus petitioner contends that the Act neither abolished any rights on the part of seamen on merchant ships operated under F.A.A. 4-4-42 agreements, neither did it create any new right for such seamen (although doing so for seamen in some other situations) but only provided that such seamen could, if they so elected, pursue the same remedy against the W.S.A.

A. Provisions Indicating Intent That General Agent Should Operate Ships and Employ Their Crews.

In the first place, House Report No. 107 makes it clear that Congress intended that ships under General Agency Agreements were to be "*operated* by experienced steamship companies." (1943 A.M.C. at 617.) Congress recognized that the W.S.A., with its extremely limited staff, could not undertake the actual operation of hundreds of merchant vessels and that, on the other hand, "the facilities, managerial skill, and operating technique of established private organizations" should be utilized for this purpose. (Id. at 614.) There is nothing to show an intent of anyone that the War Shipping Administration should do more than supervise,

control generally and otherwise allocate merchant vessels to be actually operated by experienced steamship companies.

We understand the rule to be that when a vessel is away from the home port, it is in the custody of the master at all times and that the master is responsible for its navigation, for its management and for the conduct of all business relating to the operation of the ship. Since the agent agrees to manage and conduct the business of the vessel, necessarily the agent would have to do that through the master and this responsibility is not limited by the General Agency Agreement to those limited periods of time when the vessel might be in port. Since the operating company could take no step except through its agents, the master and, ipso facto, the crew, were in truth and in fact and as we view it through the terminology of the contract itself, agents and employees of the steamship companies under Article 6 of the G.A.A. 4-4-42 with regard to the duties undertaken by the operating company in the management and conduct of business of the vessel and in performance of the numerous other duties reposed upon the company by the terms of the Agency Agreement.

Moreover, in view of what we submit to be the clear intent of the Congress under Public Law 17 and the clear purport of the Agency Agreement to place the responsibility and the duty of the actual physical management and operation of the vessels in the hands of the general agent, it must follow that the general agent must necessarily have assumed control and direction over the crew to the extent necessary to become their employer, at least for the purpose of all operations and duties other than the controls retained by the War

Shipping Administration as necessary war-time measures.

The intent that the general agent was to be regarded as employer of the crew for all such practical purposes is further emphasized by indications in House Report No. 107, supra, that the general agent was to procure *his* sea-going personnel through his customary channels (1943 A.M.C. at 617) and that seamen were regarded as only "technically Government employees." (Id. at 625.)

B. Provisions Indicating Intent That Rights of Suit Under Jones Act Preserved to Seamen.

We now turn to provisions of the House and Senate Reports indicating not only an intent that the general agents were to be the operators of the ships and employers of their crews, at least for the practical purposes of conducting such operations, but a specific intent that seamen had and retained despite provisions of the Act for administrative remedies, all of their former rights of suit against the private steamship operators under the Jones Act.

Thus in the initial paragraph of House Report No. 107 it is stated that:

> "They will continue to have the right to indemnity through court action for injury resulting from unseaworthiness of the vessel or defects in vessel appliances, and they (and their dependents) will have the right to action under the Jones Act (1920) for injury or death resulting from negligence of the employer. Such seamen will have the right to enforce claims for these benefits according to the procedure of the Suits in Admiralty Act . . ." (1943 AMC at 606.)

Again, in the following section of this report it is stated that:

> "They are not to be covered under the United States Employees' Compensation Act because they and their dependents have the right to sue for indemnity or damages under the Jones Act in case of death or injury . . ." (Id., at 607.)

Thus, it is expressly stated that:

> "The basic scope and philosophy of the measure is to preserve private rights of seamen while utilizing the merchant marine to the utmost for public wartime benefits." (Idem.)

The report also recognizes that because of the decision in the *Brady* case there was a distinct possibility that at the time of the passage of the Act and prior thereto agent operators were under an independent liability to seamen on claims for personal injuries. (Id. at 611, 635.)

Later in the Report, after describing the rights of seamen privately employed, as including rights of action in Federal or State Courts, it is stated that:

> "In addition to these peacetime remedial provisions, additional benefits for war conditions are now provided to all seamen whether private or Government employees under the decisions of the Maritime War Emergency Board." (Id. at 620.)

These provisions make abundantly clear the intent of later statements in the report to the effect that seamen on ships under General Agency Agreements are to have their rights determined the same as if in private

employment (Id., at 622 and 625) and demonstrate the fallacy of the position taken by the Oregon Supreme Court to the effect that these rights could only be enforced through the administrative procedures established under Public Law 17. Moreover, if such were true, seamen would be wholly deprived of their right to trial by jury and to bring suit in State Courts, both of which are substantial rights, without which seamen would not continue to have the "same rights" as intended under this act. (See *Bailey v. Central Vermont Ry.*, 319 U.S. 350; *Tennant v. Periot R. P. Ry. Co.*, 321 U.S. 29, 35.

The same intent expressed in the House Report is expressed in the Senate Report on the Act in stating that:

> "Inasmuch as seamen covered by Section 1 will be entitled to the rights provided under the Jones Act and general maritime law *and* to the remedies under the Suits in Admiralty Act, they are expressly excluded from any benefits which would otherwise accrue as employees of the United States under the United States Employees' Compensation Act. This eliminates the danger that seamen might recover both against the Federal employees' compensation fund and under statutory or common-law remedies for the same injury." (Senate Report No. 1813, 77th Congress, 2nd Session.) (Emphasis supplied.)

This quotation is also relied upon in *Gay v. Pope & Talbot, Inc.*, 47 NYS (2d) 16, in which the Court, after analysis of Public Law 17, reaches the conclusion with which we agree, that:

> "Thus it is clear that the congressional intent was to afford to seamen an election to enforce their claims for injuries under the Suits in Admiralty Act rather than an exclusive remedy thereunder."

The same conclusion is apparent from the provisions of General Order No. 32 (8 Fed. Reg. No. 81, p. 5414) issued on April 22, 1943, and providing by Sections 304.22 (b) and 304.28 that seamen injured between October 1, 1941, and the enactment of Public Law 17 on March 24, 1943 (as was this petitioner) may have an election to sue either in the manner provided by the Act or to enforce his rights as previously existing. (Also note that Section 304.20 expressly recognizes that ships under general agency agreements are "operated by an Agent.").

Thus, even if it be true that Public Law 17 may be construed so as to limit the remedy of seamen on ships under Agency Agreements and injured after the date of its enactment, it is made clear by the use of the term "election" that at least prior to that date such seamen had other remedies. That such remedies included the right to sue the private steamship operator under the Jones Act is made clear by the House and Senate reports to which references have already been made above.

In any event, we submit that there can be no doubt but that even if Public Law 17 was intended to limit the remedy for such seamen, it fails to satisfy the rule of the *Brady* case, supra, that the long-established rights of seamen cannot be presumed to have been limited or destroyed in the absence of a clear and unambiguous statement of Congressional intent by appropriate legislation for that purpose.

Point V. The Oregon Supreme Court Failed to Recognize That Companies Engaged in the Operation of Vessels Under General Agency Agreements Are Owners "Pro Hac Vice" and Thus Liable Under the Jones Act to Seamen Employed on Such Ships for Injuries Due to Their Negligent Operation, Regardless of Whether Such Seamen May Technically Be Employees of the Government.

The General Agency Agreement between the War Shipping Administration and the private operators did not result only in a relationship of employer and employee. As we have demonstrated above, the respondents undertook, for a consideration, to manage and operate the vessels for the War Shipping Administration. This very fact alone, aside of all other considerations, imposed an operator's liability upon the respondent. As also pointed out above (supra, pp. 22, 23, 27, 28), the United States Government, for very practical reasons, has refrained from managing and operating its own vessels in trade and commerce, but has seen fit to enter into agreements with experienced private operators, whereby the latter, in the interest of efficiency and economy, should continue the management and operation of merchant vessels in trade and commerce. The private operators of these vessels are subject to the same liabilities flowing from the operation of their own vessels or vessels which they may have been operating under charter. Thus, as we will demonstrate further below, it is the fact of management and operation of the vessel which controls and not employment.

In *Armit v. Loveland,* 115 F. (2d) 308, decided by the Third Circuit Court of Appeals, the plaintiff sued three defendants under the Jones Act. One was the vessel owner before the accident; another took title to

the vessel after the accident, but affiliated with the first owner; and the third defendant operated the vessel at the time of the accident. The Court held that all three defendants were liable on the ground that all were in some way tied up with the *operation* of the vessel. The case illustrates the liability of all those who have any share in the ship's operation. The responsibility vested not because of the ownership, but because of their participation in the management of the vessel.

Under certain forms of charters, where the possession and management of the vessel is given to the charterer, the charterer becomes owner of the vessel for the voyage or service stipulated and consequently becomes subject to the duties and responsibilities of ownership. *U. S. v. Shea,* 152 U.S. 178; *Leary v. U. S.,* 81 U.S. 607; *Reed v. U. S.,* 78 U.S. 591.

A distinction is drawn between a charter which merely provides for the use of the vessel by the charterer with the possession and management retained by the owner, and one which gives the charterer the possession and management. In the former case, it is known as a time charter with no responsibilities of ownership attaching. In the latter case, the charterer becomes owner "pro hac vice" with all the consequent rights and obligations. *U. S. v. Shea,* supra; *Leary v. U. S.,* supra; *Reed v. U. S.,* supra; *Clyde Commercial Steamships v. U. S. Shipping Co.,* 152 Fed. 516; *"The Del Norte,"* 111 Fed. 542. In the case at bar, it will be noted that both the possession and management were vested in the defendant. This alone clearly puts the defendant in position of owner "pro hac vice," entirely aside of any other refinements in the contract.

Where the management and possession of the vessel are given up to the shipping company, it is immaterial that the general owner by the terms of the contract is required to provide the crew, U. S. v. Shea, supra; *Hills v. Leeds,* 149 Fed. 878; *or to pay their wages, "The Charlotte,"* 285 Fed. 84, aff. 299 Fed. 595, cert. den. 266 U.S. 604; *Hills v. Leeds,* supra; or that the owner should assume responsibility as to fire or marine risk, *Hills v. Leeds,* supra; *Middlebrook v. U. S.,* 67 Ct. Cl. 294, cert. den. 280 U.S. 564; or that the owner should insure the vessel, *Golcar S.S. Co. v. Tweedie Trading Company,* 146 Fed. 563; or pay for insurance on it, *"The Barnstable,"* 181 U.S. 464; *or that the Captain or other officers and crew should be appointed by the owner. "The Del Norte,"* supra; *American Steel Barge Co. v. Cargo of Coal,* 107 Fed. 964; *"The Charlotte,"* supra; or that the owner should provision and equip the ship during the voyage, *In Re Certain Logs of Mahogany,* 5 Fed. Cas. No. 2, 559; or that disbursements beyond a fixed sum cannot be made without the consent of the owner, *"The Nat. E. Sutton,"* 42 F. (2d) 229; or that the general owner shall have the right to cancel and terminate the charter party of taking possession of the vessel at any time wherever it might be found, *Rich v. Jordan,* 164 Mass. 127. Congress has recognized and legislated, for purposes of limitation of liability proceedings, that a demise charterer may be deemed an owner and limit his liability. (R.S. 4286, 46 U.S.C. 186.)

It is thus clearly evident that under the general law, one who is given the possession and management of a vessel is clothed, especially with respect to third parties, with all rights and liabilities of an operating owner. It is not the name which is placed on an agree-

ment which determines the status of the parties, but the effect of the provisions. In other words, if the charterer were merely getting the use of the vessel, then he is only a time charterer and not an owner "pro hac vice." On the other hand, as in this case, if he is vested with the possession and management of the vessel, then he is the owner "pro hac vice" with consequent rights and liabilities.

As we have demonstrated above, the provisions of the General Agency Agreement and the other evidence on the record demonstrates clearly that respondent was at least the operator of the ship, even if not the employer of the crew. We thus submit that upon the basis of this fact alone respondent, as owner "pro hac vice," is liable under the Jones Act for all injuries resulting from the negligent operation of the ship and that the Oregon Supreme Court deprived this petitioner of his rights under the Jones Act in failing to so hold.

CONCLUSION

Without repeating the summary of the arguments relied on in support of the petition for certiorari submitted herewith and as summarized in said petition (supra, pp. 14 to 18) for the convenience of the Court, we submit that the Supreme Court of the State of Oregon refuses to recognize the inescapable fact that as a realistic matter a steamship company designated as a general agent of the War Shipping Administration continues to be the operator of the ships assigned to it and the employer of their crews. Instead, the Oregon Court based its decision upon the acceptance of a legalistic device under which respondent company seeks to escape responsibility for the operation of the ship

and employment of its crew, contrary to all previously admitted custom, largely by placing a construction upon one highly ambiguous contract provision—Article 3A (d)—in disregard of plain expression contained in numerous other provisions of the same contract and other evidence or record, as well as contrary to plain statements of Congressional intent in Public Law 17, and contrary to the principles established by this Court in the *Brady* case, that liability of a general agent of the government to a third party cannot be removed merely by a change in provisions of the Agency Agreement.

We further submit that because petitioner would be thereby deprived of his rights under the Jones Act to recover in a state court after a jury trial compensation for injuries due to the negligent operation of the ship, and because of the other reasons stated in the attached petition, the Supreme Court of the State of Oregon has decided a federal question of substance not theretofore decided by this Court and has decided it in a way not in accord with applicable decisions by this Honorable Court.

Respectfully submitted,

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